

Order of Dismissal with Leave to Amend
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1 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, Plaintiff must allege two essential elements: (1)
3 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
4 alleged violation was committed by a person acting under the color of state law. *See West v.*
5 *Atkins*, 487 U.S. 42, 48 (1988).

6 B. Legal Claims

7 Although Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain
8 statement of the claim showing that the pleader is entitled to relief,” Plaintiff’s complaint is too
9 sparse to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
10 rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Plaintiff’s complaint
11 refers to inmate appeal forms, however, there are no copies of any inmate appeal forms attached
12 to his complaint.

13 Plaintiff’s first claim states that Defendant McFarland’s “professional negligence and
14 disregard toward my physical health hindered me from receiving adequate medical care.”
15 (Complaint at 3.) A claim of medical malpractice or negligence is insufficient to make out a
16 violation of the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir.
17 2004). It appears that Plaintiff may be trying to allege that McFarland was deliberately
18 indifferent to his serious medical needs; however, Plaintiff’s allegation is too vague to determine
19 at this time whether he can proffer facts in support of a claim which would entitle him to relief.
20 Moreover, the Court cannot determine what those needs were or what McFarland did or did not
21 do which violated Plaintiff’s rights. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988)
22 (recognizing that liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if
23 the plaintiff can show that the defendant proximately caused the deprivation of a federally
24 protected right). Because district courts must afford pro se prisoner litigants an opportunity to
25 amend to correct any deficiency in their complaints, *see Lopez v. Smith*, 203 F.3d 1122, 1126-27
26 (9th Cir. 2000) (en banc), this claim will be dismissed with leave to amend if Plaintiff can do so
27 in good faith.

28 Plaintiff must specifically identify what McFarland did or did not do in order to state a

1 claim with regard to this claim. Plaintiff is advised that a person deprives another of a
2 constitutional right within the meaning of section 1983 if he does an affirmative act, participates
3 in another's affirmative act or omits to perform an act which he is legally required to do, that
4 causes the deprivation of which the plaintiff complains. *See Leer*, 844 F.2d at 633; *see, e.g.,*
5 *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (prison official's failure to intervene to
6 prevent Eighth Amendment violation may be basis for liability). Sweeping conclusory
7 allegations will not suffice; Plaintiff must instead "set forth specific facts as to each individual
8 defendant's" deprivation of protected rights. *Leer*, 844 F.2d at 634.

9 Plaintiff next claims that Correctional Sergeant E. Ivey failed to conduct an interview
10 with him on August 26, 2009. It appears that Ivey responded to one of Plaintiff's administrative
11 appeals. However, there is no constitutional right to a prison administrative appeal or grievance
12 system. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003). Although there certainly is a
13 right to petition the government for redress of grievances, there is no right to a response or any
14 particular action. *See Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991) ("prisoner's right to
15 petition the government for redress . . . is not compromised by the prison's refusal to entertain
16 his grievance."). To the extent Plaintiff is complaining about Ivey's failure to correctly process
17 his administrative grievance, the claim is DISMISSED for failure to state a claim. Other than
18 this general allegation, Plaintiff has made no specific factual allegations against Ivey by which
19 this Court can liberally construe a cognizable claim. Accordingly, Ivey is DISMISSED from this
20 action without prejudice.

21 Plaintiff's third claim is that Facility Captain C.B. Tucker signed an agreement with
22 McFarland and Ivey "covering their professional negligence and her own professional
23 negligence." Plaintiff's claims of negligence and a general "cover up" against Tucker fails to
24 state a claim. Neither negligence nor gross negligence is actionable under § 1983 in the prison
25 context. *Farmer v. Brennan*, 511 U.S. 825, 835-36 & n.4 (1994). Other than this general
26 allegation, Plaintiff has made no specific factual allegations against Tucker by which this Court
27 can liberally construe a cognizable claim. Accordingly, Tucker is DISMISSED from this action
28 without prejudice.

CONCLUSION

1. Defendants Ivey and Tucker are DISMISSED from this action without prejudice.

2. Plaintiff's complaint is DISMISSED with leave to amend. Plaintiff shall file an AMENDED COMPLAINT within **thirty days** from the date this order is filed to cure the deficiencies described above if he can do so in good faith. The amended complaint must include the caption and civil case number used in this order (C 10-2882 LHK (PR)) and the words AMENDED COMPLAINT on the first page. Plaintiff may not incorporate material from the prior complaint by reference. **Failure to file an amended complaint within thirty days and in accordance with this order will result in dismissal of this action.**

3. Plaintiff is advised that an amended complaint supersedes the original complaint. "[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981). Defendants not named in an amended complaint are no longer defendants. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

4. It is the Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address," and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: 10/7/2010



LUCY H. KOH
United States District Judge